IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 452 of 2001
With
CRIMINAL APPEAL No. 466 of 2001
With
CRIMINAL APPEAL No. 808 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE **Sd/-**
HONOURABLE MR.JUSTICE H.B.ANTANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MANIYABHAI KOYABHAI NAYAK - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MS SADHANA SAGAR for Appellant(s) : 1,
MR LR POOJARI, Ld. APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 22/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

1. As these appeals arise out of the Sessions Case No. 186 of 2000 decided by the Additional Sessions Judge, District Panchmahals at Godhra, at the request of the learned advocates for the parties, they all are taken up for final hearing together and are disposed of by a common judgment.

2. By virtue of the impugned judgment and order, the accused-appellant, in each appeal, has been sentenced to undergo rigorous imprisonment for 7 years and fine of Rs. 500/-, in default, simple imprisonment for 15 days for commission of the offence under Section 397 of the Indian Penal Code.

3. The facts giving rise to the sessions case, in nutshell, are as under:-

3.1. It is the case of the prosecution that, on 4.4.2000, around 11.30 p.m., at village Mehlan, the appellant-accused had committed robbery at the house of complainant Shri Laxmanbhai Sardarbhai Khant. Complainant Laxmanbhai- prosecution witness No.1 filed an FIR to the effect that on 4.4.2000, around 11.30 p.m., when he was sleeping in varanda of his house near his wife Champaben, his daughter-in-law Savitaben and his son Balvant, someone had given blows on his face. When the complainant got up and saw, he found that even his wife was given several blows. At that time, his daughter-in-law got up and ran away so as to shout for help. Because of

her shouting, people of the village had come and they also started shouting. In the circumstances, those persons had run away from his house after ransacking the belongings of the complainant. The complainant, thereafter, found that his cupboard and box containing ornaments had been broken. His jewelry including earrings and silver neckless of his wife had been looted. According to him, ornaments worth Rs. 4,000/- had been looted by the said persons. According to him, approximately 10 to 15 persons had come with an intention to commit robbery. Possibly, they were also having weapons like 'dafna' (small thick wooden stick). He had also seen one person, who had put on purple coat, but he could not see or identify the other persons. He also found that, at the time of breaking open the lock, those persons were speaking Hindi.

3.2. The complainant had further stated that when the residents of the village had come to help the complainant and his family members, the injured family members had been taken to a town, named Shahera, which is 20 Kms. from his village and, thereafter, the complainant had filed an FIR bearing No. 56/2000 at Shahera Police Station for the commission of the offence under Sections 395 and 397 of the Indian Penal Code.

3.3. It is the case of the prosecution that the panchnama of the scene of offence had been made and, in pursuance of the FIR, four accused had been

arrested and some of the stolen property had been recovered from them, after making recovery panchnama. The accused were chargesheeted in the Court of the Judicial Magistrate First Class on 12.7.2000 and thereafter, the case was committed to the Sessions Court, District Panchmahals at Godhra and the case was numbered as Sessions Case No. 186 of 2000.

4. In the course of the trial, following prosecution witnesses had been examined :-

Prosecution Witnesses Nos.	**Names**	**Exh. Nos.**
01	Laxmanbhai	09
02	Dr. Gitaben	11
03	Chhaganbhai	14
04	Balvantsinh	15
05	Savitaben	16
06	Kailashben	17
07	Champaben	18
08	Amarsinh	19
09	Manharbhai	20
10	Kalubhai	22
11	Chandrasinh	25
12	Kirankumar	27
13	Udesinh	30
14	Abdulmajid	32
15	Balvantsinh	38
16	Bhimsinh	39
17	Rumalbhai	40
18	Hemantkumar	41
19	Jordan	42
20	Dr. Prabhakar	44

21	Ishakbhai	48
22	Ranchhodbhai	50
23	Bhagwanbhai	52

Upon examining the afore-stated witnesses and upon perusal of the documentary evidence produced before the trial court in the nature of panchnama and medical certificates, the trial court came to the conclusion that the accused had committed the offences under the provisions of Section 395 and 397 of the Indian Penal Code.

5. For coming to the said conclusion, the trial court relied upon the evidence of the complainant and other witnesses, who were present at the time when the offence was committed. The trial court also relied upon the documentary evidence, which was in the nature of recovery panchnama of the ornaments, which had been looted by the accused. The trial court also considered the medical evidence and came to the conclusion that deposition of witnesses regarding injuries was supported by the medical certificates.

6. Learned advocate Ms. Sadhana Sagar, appearing for the appellant-accused, has submitted that the trial court did not appreciate the evidence in proper manner and, according to her, in absence of a test identification parade, the trial court could not have convicted the three accused. Accused No.4 had been acquitted. The submissions, which she has made, have been summarized as under:-

(1) No test of identification parade had been held so as to establish that the accused were the persons who had committed the offence.

(2) The trial court materially erred by considering the evidence of eye witnesses, who had identified the accused in the court and that too when they had admitted in the cross-examination that upon being informed by the police that the accused had committed the offences, they had identified the accused in the court.

(3) The witnesses had stated before the court, while deposing,that they knew the accused. In spite of the said fact, the accused were not named in the FIR, which had been filed on the next day of the occurrence of the offence. Even in the course of investigation, when the police personnels were investigating the offence and had visited the scene of offence, at no point of time, the accused were named by the witnesses, including the complainant.

(4) So as to hold the accused guilty of 'decoity', there ought to have been at least five accused. As there were less than five accused, it cannot be said that the accused are guilty of decoity.

7. On the other hand, learned APP Mr. L.R. Poojari,

has vehemently submitted that the judgment delivered by the trial court convicting the accused is just, legal and proper. He has submitted that the eye witnesses had identified the accused in the court. It has been further submitted by him that the ornaments which had been recovered from the accused had been identified by the witnesses. He has also submitted that when the accused had been identified in the course of the trial, there is no reason for the trial court to disbelieve the eye witnesses and, therefore, the trial court has rightly convicted the accused. He has fairly submitted that as there was no evidence forthcoming against accused No.4 Emanbhai, the trial Court has acquitted him.

8. In the course of the arguments, learned advocates had relied upon the following judgments:-

Judgments relied by learned advocate Ms. Sadhana Sagar	**Judgments relied by learned APP Mr. L.R. Poojari**
1.1998 SCC (Criminal) 1232 George & Ors. Vs. State of Kerala and Anr.	1. AIR 1963 SC 174 Mohan Singh & Anr. Vs. State of Punjab.
2. 1993 (1) Crimes 451 Harish Natvarlal Mistry & Ors. Vs. State of Gujarat	2. AIR 1854 SC 457 Nar Singh & Anr. Vs. State of U.P.
3. 1992 Cri. L.J. 2333 Karam Singh alias Karmu Vs. The State by the Inspector of CBCID, Madras.	3. AIR 1969 SC 689 Ramu Gope & Ors. Vs. State of Bihar.
4. 1972 Cri. L.J. 15 Rameshwar Singh Vs. State of Jammu & Kashmir.	4.AIR 1958 SC 350 Kanta Prasad & Anr. Vs. Delhi Administration.
5. AIR 1982 SC 839	5. AIR 1974 SC 791 Sampat

Judgments relied by learned advocate Ms. Sadhana Sagar	**Judgments relied by learned APP Mr. L.R. Poojari**
Mohanlal Gangaram Gebani Vs. State of Maharashtra.	Tatyada Shinde Vs. State of Maharashtra.
6. AIR 1987 SC 1222 Subhash & Shiv Shankar Vs. State of U.P.	6. AIR 1983 SC 446 Earabhadrappa Vs. State of Karnataka.
7. 2003 AIR SC 3787 Sau Vijaya @ Baby Vs. State of Maharashtra.	7. AIR 2004 SC 299 Lal Singh & Ors. Vs. State of U.P.
	8. AIR 2004 SC 1920 Dhanaj Singh alias Shera & Ors. Vs. State of Punjab.
	9. 2004 (4) SCC 158 Zahira Habibulla H. Sheikh & Anr. Vs. State of Gujarat & Ors.
	10. AIR 1962 SC 1821 R.K. Dalmia & Ors. Vs. Delhi Administration.

9. We have heard the learned advocates at length and have also considered the evidence adduced before the trial court. We have also gone through the statements recorded under Section 313 of the Code of Criminal Procedure and the explanation given by the accused before the trial court so as to show their innocence.

10. Upon hearing the learned advocates and upon going through the entire records, we are in agreement with the submissions made by learned advocate Ms. Sadhana Sagar and we are of the view that the accused could not have been convicted on the basis of the evidence which had been adduced before the trial court.

11. We are in agreement with submission of learned advocate Ms. Sagar that, factually, no test identification parade had been held before the witnesses. The accused were identified in the court room for the first time. It was the case of the prosecution that robbery had taken place at 11.30 p.m. Possibly, at that time, light must not have been sufficient to identify the accused. In the circumstances, as per the deposition of complainant Laxmanbhai (PW No.1), he could not identify anybody and he could see only one person having purple coat. He had clearly stated in the deposition that he could not identify any person though according to him, there were 8 to 10 persons, who had participated in the robbery.

12. The above fact clearly denotes that complainant Laxmanbhai (PW No.1) did not know as to who had participated in the robbery. Had he been knowing the accused, he could have surely given the names in the FIR, which had been filed on the next day. For the reasons best known to the complainant, neither the names of the accused were given in the FIR nor they were revealed thereafter in the course of investigation, when statement of Laxmanbhai (PW No.1) had been recorded. Similarly, in the course of investigation, no other eye witness gave name of any of the accused and reiterated the fact that the accused were unidentified.

13. If, this was the position, it is really strange as to how the eye witnesses identified the accused, when they saw them for the first time in the court room, in absence of any test of identification parade.

14. In our opinion, even holding of the test of identification parade would not have helped the prosecution because the eye witnesses had stated that they could not see the persons who had participated in the robbery. If, they had not seen the accused at all, possibly, they could not have identified any of the accused, even at the time of test identification parade.

15. It is pertinent to note that, for the first time, the accused had been identified in the court room and in the cross-examination, they admitted that they had been informed by the police that the accused had participated in the robbery. It means that the prosecution had given hint of identification to the eye witnesses and, therefore, the eye witnesses identified the accused in the court room.

16. In our opinion, to convict a person on the basis of such identification would not be in the interest of justice. It would be very dangerous to convict the accused in view of the fact that the witnesses had not seen them and they identified the accused only upon an indication given by police.

17. We, therefore, do not hesitate in coming to the conclusion that in absence of the test identification parade and in absence of any accused being named in the FIR or in the police statement, the trial court could not have convicted the accused. Thus, so far as the first three submissions of the learned advocate for the appellant are concerned, they are justified and they should result into acquittal of the accused.

18. Though, on the basis of the afore-stated submissions, the appellant-accused deserve to be acquitted, there is one more reason for which the appellant could not have been convicted. Even if one looks at the charge, there is no mention of five persons having committed the offence. On bare perusal of definition of the term 'Dacoity', it is crystal clear that so as to commit an offence of 'dacoity', as per Section 391 of the Indian Penal Code, five or more persons conjointly, should have committed or attempted to commit a robbery. If the offence is committed by less than five persons, it would not amount to 'dacoity', as defined under Section 391 of the Indian Penal Code, but it would amount to only robbery. In the instant case, the accused have been convicted for having committed 'dacoity' and not robbery.

19. For the afore-stated reasons, we are of the opinion that the impugned judgment convicting the accused is not based on the sound principle of

appreciation of evidence and, therefore, we hereby quash and set aside the judgment and order of sentence passed by the learned Additional Sessions Judge, District Panchmahals at Godhra in Sessions Case No. 186 of 2000 and the accused are set at liberty, unless they are required in any other offence. So far as the muddamal is concerned, detailed directions given by the Trial Court are not disturbed and the muddamal to be disposed of in terms of the order passed by the Trial Court. Direct service is permitted.

Sd/- Sd/-

(ANIL R. DAVE, J.) (H.B. ANTANI, J.)

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